Supreme Court, U.S.
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In The
Supreme Court of the United States

PORTEAL GROOM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the District Court err in finding that Petitioner should not receive a new trial because the Government's "International Narcotics Distribution Expert" admitted perjury, giving false academic credentials and mis-characterizing his past investigative experience, would have raised a reasonable likelihood that the false testimony could have effected the judgment of the jury?

2. Did the District Court err in finding that Petitioner should not receive a new trial because Petitioner's trial counsel failed to provide effective assistance in that he was, subsequent to the trial, convicted of illegal wire fraud activities which occurred during the trial and was under intensive psychiatric care for clinical depression throughout the trial; trial counsel's conduct raise a reasonable probability that Petitioner's representation was ineffective and could have affected the outcome of the trial?

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CITATIONS OF PRIOR OPINIONS

The Opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A to the Petition and is unpublished (U.S. v. Groom, Unpublished Op. No. 01-7227; it was submitted November 29, 2001 and decided December 6, 2001). (Appendix A). The Opinion of the United States District Court for the District of Maryland appears at Appendix B to the Petition and is published, (*West Supp. 2001;* it was decided May 24, 2001).

JURISDICTIONAL STATEMENT

This Petition seeks review of an Opinion and Order of the Fourth Circuit Court of Appeals entered on December 6, 2001 affirming the District Court's denial of Petitioner's 28 U.S.C. § 2255 Petition. Petitioner first raised the issues presented here in the United States District Court for the District of Maryland, which denied Petitioner's 28 U.S.C. § 2255 Petition on May 24, 2001 (West Supp. 2001). A Certificate of Appealability was denied by the District Court. The Fourth Circuit Court of Appeals ordered informal briefing; on December 6, 2001, the Fourth Circuit Court of Appeals denied the Certificate and dismissed the Appeal after entering an unpublished opinion. This Petition is filed pursuant to 28 U.S.C. § 1254(1) and Hohn v. United States, 118 S.Ct. 1969 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's first issue involves an interpretation of the Due Process Clause of the Fifth (5th) Amendment to the United States Constitution in relation to the Prosecutor's use at trial of perjured testimony of the Government's "International Narcotics Distribution Expert". The language of the Fifth Amendment relevant to this case reads as follows:

". . . nor be deprived of life, liberty, or property without due process of law. . ."

Petitioner's second issues involves an interpretation of the Sixth (6th) Amendment to the United States Constitution regarding whether the conduct of Petitioner's trial counsel met the requirement of effective assistance of counsel. The language of the Sixth Amendment relevant to this case reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence".

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the District of Maryland, Southern Division, Petitioner and co-defendant Donald Wardrick were convicted on June 10, 1996 of conspiracy to possess heroin with intent to distribute in violation of 21 U.S.C. § 846; possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; conspiracy to import heroin in violation of 18 U.S.C. § 963; and, importing heroin in violation of 18 U.S.C. § 952, 18 U.S.C. § 963 and 18 U.S.C. § 2. Petitioner was sentenced on November 25, 1996 to a lengthy term of imprisonment followed by supervisory release. An appeal was taken to the United States Court of Appeals for the Fourth Circuit on November 25, 1996. The Court of Appeals, in a published decision, affirmed on April 13, 1998, Case Number 96-4908, and a Petition for Rehearing was denied on May 11, 1998.

A key and final Government witness was Johnny St. Valentine Brown (hereinafter "Brown"), a purported consultant to the Metropolitan Police Department for the District of Columbia. Over objection, Brown testified as an expert on international narcotics distribution. He discussed the process of making heroin, the role of Pakistan in the

international drug trade, the methods of transporting drugs, the various participants in a drug ring, wholesale and retail prices of heroin, and the "profile" of a narcotics distributor. The "profile" characteristics of a narcotics distributor included the use of pagers, cellular phones and pre-paid phone cards; Brown stated all three were communication devices commonly used by narcotic distributors. He also testified that narcotics distributors usually have other business "fronts" in order to look legitimate. Testimony at trial showed the co-defendants possessed a cellular phone, pre-paid phone cards, and pagers at the time of their arrest and each owned his own business.

Wardrick and Petitioner objected to the expert testimony. Wardrick objected to all of the testimony on the basis that it was cumulative and merely attempted to "bootstrap" the Government's case by using testimony of the profile. Petitioner objected to any discussion of cellular phones or counter-surveillance techniques under Fed. R. Evid. 702 and Fed. R. Evid. 403.

Both defendants were convicted of all charges. The District Court sentenced Petitioner to two hundred sixty two (262) months imprisonment. The conviction was originally affirmed by the Fourth Circuit Court of Appeals on direct appeal and a Petition for Writ of Certiorari was denied by this Court.

After the completion of the direct appeal, Petitioner learned that the Government's International Narcotics Distribution Expert, Brown, had perjured himself during trial by giving false academic credentials and by mis-characterizing his past investigative experience in investigating international narcotic transactions. Since Petitioner's trial, Brown has pled guilty to multiple counts of perjury and has been sentenced to a lengthy period of incarceration. During his plea, Brown admitted to committing perjury about his academic credentials and police experience in thousands of criminal cases in various state and federal jurisdictions.

In this case, Brown testified that he was a "board-certified pharmacist" and stated in his curriculum vitae that he held a degree in pharmacy from Howard University. It is undisputed from the evidence presented to the District Court by Petitioner that neither Virginia, Maryland, nor the District of Columbia has any record of Brown being a licensed pharmacist in any of those jurisdictions and that Howard University has no record of "Johnny Brown, Jr." ever having received any degree from that University. The District Court noted in its opinion that:

> "Groom has also submitted information tending to show that, contrary to his [trial] testimony, Brown never traveled to Pakistan for investigation of narcotics cases; that he was hired by the Metropolitan Police Department not as a narcotics consultant but as a senior police officer; and that the Metropolitan Police Department paid him $30,000 per year instead of $70,000 per year." (At 2-3)

All of this perjured testimony was presented as an integral part of the Government's use of Brown as their key expert and final witness against Petitioner.

With regard to Petitioner's ineffective assistance of counsel issue, after trial and direct appeal, Petitioner learned of significant new evidence relating to his relationship with his trial lawyer, Thomas R. Dyson (hereinafter "Dyson"). Dyson was retained to represent Petitioner on August 7, 1995. Dyson's representation continued throughout Petitioner's trial. (May - June, 1996). Present Counsel began to represent Petitioner in his direct appeal to the Fourth Circuit Court of Appeals.

On June 19, 1997, Dyson was voluntarily disbarred in the District of Columbia. No reasons were stated by the District of Columbia Court of Appeals.

Between 1986 and 1997, Dyson was under the care of Dr. Eugene Conley, an Alexandria, Virginia psychiatrist, for three different time periods: October 10, 1986 to December 31, 1989; October 17, 1992 to May 23, 1993; and December 6, 1996 to July 22, 1997. Dr. Conley diagnosed Dyson with Severe and Recurrent Major Depressive Disorder without Psychotic Features.

In preparing a Psychiatric Report for Dyson's own criminal proceedings, Dr. Conley detailed each of Dyson's periods of treatment. With respect to 1996-1997, the sessions immediately followed on the heels of Petitioner's criminal trial; Dyson visited Dr. Conley 53 times. In his Psychiatric Report offered to the District Court by Dyson's counsel, Dr. Conley stated:

> "When Mr. Dyson came to see me this time-- almost three and a half years later-- he reported that he had been profoundly depressed for the past three to four months [about the time of Petitioner's trial] and that he had been depressed for the past year. He looked very depressed and his mood was one of almost complete lack of affect or emotional spontaneity. He reported that he had not been doing anything. He said that he could no longer work and that he wanted to just give up. He said, in a very despairing and pessimistic way, "I haven't had a drink in over 20 years and yet I am as screwed up as I could possibly be." He reported that he had been lying to everyone to cover his being a complete failure. He was lying to clients about work being done that wasn't done. He had terrible financial problems that had escalated completely out of control because he had not been earning any money. He had complaints filed at the Bar for lying in

relationship to his work. He had major problems with clients that would take more than $50,000 to straighten out."....

..."Mr. Dyson has to be seen often because of the severity of his depression. In other words, once a week would not be proper in terms of the degree of his depression and the severity of his despair. I felt that I had to be extremely accessible to someone with this degree of despair and suicidal potential..."

..."I think I had seen him on January 11 and January 16 {1997}, and I got a call from him on the January 21 in the morning. It was an emergency call. He said he had to see {me} that day. I changed my schedule and saw him....{He} looked as bad as I had ever seen him.

He told me he had set that date as the date to commit suicide...He had gone to the store and bought a large amount of over-the-counter sleeping pills and taken them to his office. When he planned to start taking them, he just couldn't go through with it.

It was in the middle of that appointment that he first clearly admitted to me that he actually stole money from an estate and that is the unpardonable sin." (Emphasis added)

This "unpardonable sin" was the violation of a fiduciary relationship with his clients, Dean and Geoffrey Fisher. Dyson defrauded his clients, who were beneficiaries of the Estate of Betty Murray, of $52,545.90 by wiring said funds from the estate account to his personal account.

According to Information Criminal Number 99-0201, filed in the United States District Court for the District of Columbia on June 15, 1999, Dyson was charged with wire fraud, 18 U.S.C. § 1343:

> On or about April 15, 1996, in the District of Columbia, THOMAS R. DYSON, for the purpose of executing, and attempting to execute, a scheme or artifice to defraud Dean Reed Fisher and Geoffrey Lee Fisher of and concerning their inheritance from the Estate of Betty Reed Murray, that is money, did transmit and cause to be transmitted in interstate commerce, by means of a wire communication, certain signs, signals, sounds or any appropriate combination of the three, that is, a wire transfer from a Signet/Virtus Treasury Money Market Fund account located at Richmond, Virginia-based Signet Financial Services to his personal account with Franklin National Bank in Washington, D.C.

On June 24, 1999, AUSA Ronald W. Sharpe, filed a Notice Of Filing A Plea Agreement And Factual Proffer. On the same date, the Assistant United States Attorney sent Dyson's counsel, Preston Burton, a letter setting forth the "complete plea offer". Paragraph 2, "NATURE OF THE OFFENSE" states:

> "Thomas R. Dyson agrees that his plea of guilty to one count of wire fraud covers his conduct from approximately October 15, 1995 through October 1996. During that time, Mr. Dyson abused his role as executor of the estate of Betty Reed Murray by writing checks on the estate's accounts and wiring

> money from the estate's accounts then appropriating the proceeds from those checks and electronic transfers for his personal use, thereby defrauding the beneficiaries Dean Fisher and Geoffrey Fisher out of their inheritance. Mr. Dyson agrees that he will not contest that the $52,545.90 loss suffered by the beneficiaries of the Estate of Betty Reed Murray constitutes relevant conduct to the offense to which he is pleading guilty for purposes of calculating the amount of the loss as described in Section 2F1.1(b)(1) of the Sentencing Guidelines."

Dyson had a fiduciary duty to Ms. Murray which duty he abused by taking the assets of her estate in the amount of $52,545.90. Aggravating the situation, Dyson took these funds for his personal use. Ms. Murray's beneficiaries, Dean Fisher and Geoffrey Fisher, lost their inheritance to Dyson.

On or about June 30, 1999, for a status hearing scheduled for the same date, AUSA Sharpe prepared a Factual Proffer detailing the offense to which Dyson was expected to plea. It showed that at the time of her death, Ms. Murray owned five large investment accounts, plus several smaller ones. From November 11, 1995 to December 1, 1995 (while also representing Petitioner) Dyson transferred all funds from the five accounts into three executor accounts. Dyson had a personal checking account at a bank in the District of Columbia. On November 29, 1995, Dyson drafted and signed a check drawn on one of the executor accounts made payable to himself in the amount of $21,500 and deposited it into his personal account less $500 retained as cash. On December 4, 1995, there was a second transfer in an amount of $93,405.81. From November 1995 to September 1996 (during the time Petitioner's case was moving through the pre-trial and trial) Dyson made seven

fraudulent withdrawals totaling $4,405.00 from one of the executor accounts. In each case, the checks were made payable to Dyson personally. Four checks were deposited into his personal account, while the remaining three checks are unaccounted for. On April 10, 1996, (only a short before Petitioner's trial began) Dyson fraudulently transferred an additional $26,640.90 into is personal account. On January 14, 1997, Dyson met with the heirs and confessed that he had stolen $30,000 from the estate. He never returned the money. During a September 15, 1998 interview with the FBI, Dyson explained that he knew he had "misused' the funds and that more than $40,000 was involved. He stated he expected to go to jail. Lastly, Dyson told the heirs' lawyer that if the Virginia State Bar's Client Protection Fund did not reimburse the Fisher's, he would try to repay the loss.

As Petitioner's May trial date approached, there were substantial discovery materials forwarded to Dyson by AUSA Salem. Materials about the Government's expert, Johnny Brown, (including his Vitae) proposed trial stipulations and notice that the Government intended to call certain critical cooperating witnesses, Sirianni, Cox, Mojica and Mowbray were also delivered to Trial Counsel. Further, during his representation of Petitioner, Dyson failed to cross-examine Pakistani witnesses, Ahmed, Rajput, Mughal and DEA Agent Lowe; he failed to attempt to prevent the testimony of the key cooperating co-defendant Mojica based on late notice; he failed to object to the entire testimony of Brown, despite the claims he made about his credentials and international police work his curriculum vitae; he failed to file pre-trial motions attacking the chain of custody; and he failed to attend the Mojica plea. Instead, Dyson was suffering from severe and recurrent major depressive disorder that was causing him to lie to his clients about work on their cases, to lose money from his inability to perform adequately, and, finally, to steal from his clients in order to pay off his debt. The District Court refused to hold

an evidentiary hearing on the ineffectiveness issue although specifically requested to do so by counsel. In fact, the District Court did hold such a hearing specifically on the Brown perjury issue while ignoring the Dyson issue although the District Court had been furnished with the lengthy psychiatric report and District of Columbia criminal case materials cited above.

ARGUMENT

1. **Did the District Court err in finding that Petitioner should not receive a new trial because the Government's "International Narcotics Distribution Expert" admitted perjury, giving false academic credentials and mis-characterizing his past investigative experience, would have raised a reasonable likelihood that the false testimony could have effected the judgment of the jury?**

A. Standard of Review

The standard of review correctly used but incorrectly applied by the District Court is that granting a new trial, based upon the undisputed perjured testimony by Police Officer Brown, turns on whether there is a reasonable probability that the false testimony could have affected the outcome of the trial. U.S. v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994); United States v. Agurs, 427 U.S. 97, 103 (1976)).

B. Applicable Law at Issue

Brown was the last and certainly the most critical witness for the Government. Brown, purportedly a police officer with the Metropolitan Police Department, District of Columbia, began his testimony as follows:

Q. Sir, where are you currently employed?

A. The Metropolitan Police Department, District of Columbia. (Trial Transcript, hereafter "TTR.", 486 (Emphasis supplied)

As part of the pretrial discovery process, the Government had submitted Brown's Vitae to defense counsel. Brown testified that he had been an expert witness for the Government on at least 4,000 occasions in some 26 jurisdictions. (TTR. 492) He also testified to his educational and professional qualifications:

Q. Are you certified in any medical or pharmacist area?

A. Yes.

Q. And what is that?

A. I'm a board-certified pharmacist. I receive, compound, and dispense narcotic substances prescriptions.

Q. Do you know how to make heroin?

A. Yes. (TTR. 492) (Emphasis supplied)

Both the Government and Petitioner agree that Brown's statement to the jury that he was a board certified pharmacist was false. In his Vitae, Brown falsely states that he had a "Bachelor of Science Degree (Pharmacy) from Howard University." All of these representations were false. Brown had no college degree at all nor was he a police officer with the Metropolitan Police at the time of his testimony. Petitioner discovered this new evidence after he was convicted.

Significantly, Brown testified that he had been an expert in thousands of cases. Numerous motions to vacate have been filed in various District Courts relating to different degrees of perjured testimony by Brown.

The purpose of this type of narcotics expert testimony has been questioned by Courts and commentators. The profile evidence which the jury heard through Brown is akin to the introduction of bad character evidence and presents issues that jeopardize the fundamental fairness of a trial itself. See United States v. Williams, 957 F.2d 1238, 1242 (5th Cir. 1992); United States v. Beltran-Rios, 878 F.2d 1208, 1210 (9th Cir. 1989). A particular noteworthy assessment of profiling is that it constitutes "group character evidence":

> "A moment's reflection on these categories of evidence reveals that "group" character evidence is objectionable for the same reason as is traditional character evidence; probative value depends upon the jury drawing the forbidden inference that the defendant has a propensity to commit the crime with which he is charged."

State v. McMillan, 590 N.E.2d 23,32 (Ohio Ct. App. 1990) (sexual abuser profile).

The profile match which occurred in Brown's key testimony, whether direct or indirect, creates, in the mind of jurors, an irrebuttable inference that because the defendant fit the profile of the "typical" drug courier, he must be guilty. Logic dictates if only the guilty behave in a certain manner, and the defendant behaves in that manner, the defendant is guilty. Therefore, the defendant must disprove that only the guilty behave in that manner in order to prove that he is not guilty. Thus the Government creates a compulsion on the defendant to defend not only himself, but the third persons

making up the group character profile evidence. "The Drug Courier Profile: In Planes, Trains, and Automobiles; And Now In The Jury Box" (American University Law Review Vol. 46 No.3, February, 1997, Mark J. Kadish). This is precisely what Brown accomplished with the jury and why his testimony was so crucial to the Government's case. Brown, in carefully orchestrated testimony made it appear that the unknown smugglers he was discussing with the jury were the defendants on trial. For example, the comparisons made by Brown were always based on 12 kilograms of heroin, coincidentally the same amount of heroin seized in the case. (See TTR.514, 524, 525, 527, 529, 530). Another example is Brown's description of how heroin is packaged in suitcases and what kind of suitcases are used by traffickers. Rather than testifying generally about suitcases, Brown left the witness stand and used the suitcase entered into as evidence by the Government, to describe the techniques used by unknown third parties. (TTR.509-511). This use of the expert profiler has an enormous impact on the jury as he gives his opinion about smugglers, in general, while using evidence that is actually before the jury and about which he has absolutely no personal knowledge.

This highly prejudicial use of the expert becomes entirely suspect when Brown's testimony (TTR. 492) that, "I'm a Board Certified Pharmacist. I receive, compound, and dispense narcotics substances prescriptions", proves to be false. Brown, at the inception of his testimony, is offered to the jury as a Board Certified Pharmacist, supposedly employed by the Metropolitan Police Department of the District of Columbia. Even this statement was false. He claimed to have testified in some 4,000 cases. (This devastating fact is undoubtedly true). The Government's purpose in qualifying Brown as a Board Certified Pharmacist was to impress the jury and make the remainder of his testimony more credible; it can not be overlooked that Pharmacists are often equated with Doctors. It was also designed to buttress certain key portions of his testimony,

such as teaching police officers drug identification, and how he could even to make heroin. Obviously, as a purported pharmacist, Brown's knowledge of how to make heroin would not surprise the jury, but not being a pharmacist at all, raises issues which could not be cross-examined by defense counsel since Brown's lies were unknown to defense counsel at trial. Additionally, It is significant that the Government spends 2 and 1/2 pages of transcript explaining to the jury how heroin is made.(TTR.502-504). Of course, this knowledge of chemistry must have been most impressive to the jury and buttressed the credibility of the rest of Brown's testimony. This chemistry lesson was strategically placed by the Government at the beginning of Brown's testimony. Another example of Brown's expertise in chemistry occurs in his discussion of polythene (TTR.511-512), where Brown explains how the substance is used to line suitcases, using the luggage admitted as evidence as his "prop". Surely, had the District Court known that Brown had never gone to Howard University to obtain a degree in pharmacy, or for that matter, that he did not possess any degree, the Trial Judge's ruling on the admissibility of any of his "expert" testimony would undoubtedly have been different with a result of a different trial outcome.

This Court has long held that the Due Process Clause protects the rights of an accused from a conviction based upon false witness testimony. See Mooney v. Holohan, 294 U.S. 103 (1935). In Alcorta v. Texas, 355 U.S. 28 (1957), the Court applied an invigorated Mooney principal. The Defendant was convicted of first degree murder; a defense claim of "sudden passion" was rejected after a witness answered the prosecutor's questions by saying that he had not kissed the defendant's wife (the victim), on the night of the murder and that he had only a casual relationship with her. Although the witness had previously told the prosecution that he had sexual intercourse with the victim on several occasions, the state did not disclose this. This Court reversed finding a violation of due process because

the prosecutor knowingly allowed an important witness to create a false impression at trial. The impact of Brown's "professional education" and his alleged "international travel" to drug exporting countries was designed to have a great impact of the jury and it undoubtedly did. Brown, the renouned expert, but also a liar, boot-strapped his falsities into highly persuasive testimony designed by the prosecutor as a capstone to a rather weak case against Petitioner. No one can deny the importance of police officer testimony, particularly when the Officer purports to be one of the world's leading experts in narcotics transactions.

Interestingly, the Fourth Circuit itself recognized the importance of this issue in Boyd v. French, 147 F.3d 319 (1998). The Circuit stated:

> And, knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution. See Wedra v. Thomas, 671 F.2d 713, 717 n. 1 (2d Cir.1982); Curran v. Delaware, 259 F.2d 707, 712-13 (3d Cir.1958) (citing Pyle v. Kansas, 317 U.S. 213, 60 S.Ct. 177, 87 L.Ed. 214 (1942)); cf. Boone v. Paderick, 541 F.2d 447, 450-51 (4th Cir.1976) (recognizing that withholding of exculpatory evidence by police is imputed to the prosecution). (Emphasis supplied)

Boyd, at 328-329. Here, the Government is responsible for Brown's perjury as a police officer; under this strict liability standard, the Government has knowingly used perjured testimony and violated the Due Process Clause of the Fifth Amendment to the United States Constitution. See Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959).

Brown's lies cannot be disposed of by a simple finding that they were of scant impeachment value. When a jury hears the testimony of a law enforcement officer, they

expect it to be true because he is "the law". If this jury had learned Brown himself was not obeying the law, his testimony may well have been disregarded by the jury. This concept was also addressed in another Fourth Circuit case, United States v. Kelly, 35 F.3d 929 (1994):

> Even if the false testimony relates only to the credibility of a Government witness . . . a conviction must be reversed when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103, 96 S.Ct. at 2397; accord Napue, 360 U.S. at 269-70, 79 S.Ct. at 1177. This is so because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue, 360 U.S. at 269, 79 S.Ct. at 1177. (Emphasis supplied)(At 934)

In United States v. Dunnigan, 507 U.S. 87, 93-95 (1993), this Court established the standard for perjury:

> . . . a witness testifying under oath or affirmation [commits perjury] if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory."

Clearly, Brown's testimony was materially false and made with willful intent to deceive the jury. See also Hall v. United States, 30 F. Supp. 2d 883, 891-92 (U.S.D.C. E.D.Va. 1998).

The district court, in Spicer v. Warden, 31 F.Supp. 2d 509 (U.S.D.C. Md., 1998) addressed a similar issue of false testimony citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995). There, the district court appears to correctly apply the standard for perjured trial testimony:

> Arguably the standard applicable to perjured testimony applies. See Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); United States v. Kelly, 35 F.3d 929 (1994). Again, a prosecutor is held to know of perjury if he "should have known" of its existence, which the circumstances strongly indicate was the case here. United States v. Agurs, supra. By this standard, "[e]ven if the false testimony relates only to the credibility of a Government witness and other evidence has called that witness' credibility into question, a conviction must be reversed when there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Untied States v. Kelly, 35 F.3d at 933 (quoting Agurs, 427 U.S. at 103, 96 S.Ct. 2392).(At fn 6, 518)(Emphasis added)

The material perjury in the context of Petitioner's case is at least as aggravating as the apparent perjury in other cases decided by this Court, particularly using the "should have known" standard which must apply here since Brown was a purported police officer witness. The perjury is particularly offensive since it comes from a law enforcement officer whose trial ending testimony was designed to bootstrap the weaker evidence against Petitioner. There is a reasonably likelihood that Brown's false testimony could have effected the judgment of the jury.

The District Court erred in its decision on this constitutional issue by simply using the correct test of

whether "reasonable likelihood that the false testimony could have affected the judgment of the jury", U.S. v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994), without delving into the purpose and depth of Brown's testimony. But, the issue of Brown's perjury is much broader than a reader would glean from the District Court's faulty analysis. Brown's perjury apparently is not only a regional problem for the Department of Justice and many Trial and Appellate Courts, but also is a national problem which goes to the heart of a prosecutors responsibility and accountability for the testimony of police officers placed on the stand to testify as a Government expert in a criminal case. Thus, the District Court should not have cast aside the teachings of this Court and Boyd v. French, 147 F.3d 319, 329 (4th Cir. 1998), cert. denied, 119 S.Ct. 1050 (1999), by erroneously concluding its opinion without using heightened scrutiny to review police officer perjury. The Government is the Government. A police officer is a part of the Government and, here the Government and Brown failed in their duty to bring the truth to the trial. Thus, Brown's perjury impacts more than his academic credentials; it infects his entire testimony.

The Supreme Court should grant the Writ in this case because explication of the imputed perjury standard is required to establish the importance of the rule and a national standard for its application to criminal cases, particularly where the perjurer is a police officer testifying as the Government's key International Narcotics Distribution Expert. The Due Process Clause demands no less.

2. **Did the District Court err in finding that Petitioner should not receive a new trial because Petitioner's trial counsel failed to provide effective assistance in that he was, subsequent to the trial, convicted of illegal wire fraud activities which occurred during the trial and was under intensive psychiatric care for clinical depression throughout the trial; trial counsel's conduct raise a reasonable probability that Petitioner's representation was ineffective and could have affected the outcome of the trial.**

A. Standard of Review

The standard of review to vacate a conviction based on effective assistance of counsel requires Petitioner to show (1) that the attorney's performance was deficient and (2) that the deficient performance prejudiced the defense in a manner that deprived the Petitioner of a fair trial. Further, in assessing whether an attorney's performance is deficient, a Court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Finally, if counsel's performance is deemed deficient, Petitioner may prevail only if there is a reasonable probability that, but for counsel's errors the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668 (1984).

B. Applicable Law at Issue

Generally ineffectiveness of counsel is measured by the two-pronged test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). However, Strickland also notes that there is a certain range of cases where prejudice will be presumed. In those cases, the defendant does not have to meet the two-pronged test requirements.

In United States v. Cronic, 466 U.S. 648 (1984), this Court outlined some examples of per se ineffectiveness:

> "Most obvious, of course, is the complete denial of counsel.... Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable...
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide an effective assistance is so small that a presumption of prejudice is appropriate without an inquiry into the actual conduct of the trial."

The most common per se ineffective assistance of counsel case occurs is when defense counsel has an actual conflict of interest. See Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 1917 (1980). Justice O'Connor stated the test for a conflict of interest in Strickland at 104:

> ". . .only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that actual conflict of interest adversely affected his lawyers performance."

A small group of cases has used the conflict of interest issue to analyze trial lawyer misconduct. In Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985) trial counsel, who was also lead counsel, was under investigation for disbarment by the South Carolina Board of Commissioners and Grievances. Roach claimed that because his lawyer was representing him while under this investigation, there was an inherent unconstitutional conflict of interest. The Court

applied the Strickland conflict of interest test cited above. Finding no actual conflict, the Fourth Circuit noted at 1479:

> First, Brooks [Roach's lawyer] was not under investigation by the same authorities that were prosecuting Roach. Secondly, Roach has made no showing that this alleged conflict of interest impaired Brooks' ability to defend Roach. The state post-conviction court and the district court below conducted a review of the disbarment record and found that the transcripts were totally devoid of any evidence or allegation casting doubt on Brooks' ability to represent his client Roach. (Emphasis supplied)

This case, on its face, is distinguishable from Roach. First, although not under investigation during Petitioner's trial, Dyson was committing federal criminal violations while representing his client. Secondly, the theft of money by Dyson in a fiduciary capacity reflects conduct comprising the worst moral turpitude. Ultimately, Dyson was investigated and prosecuted by the same federal authority which prosecuted Groom. While Petitioner is not suggesting a per se rule of conflict of interest merely because Dyson was committing criminal acts while standing before the Trial Court in this case, Groom is suggesting that this matter must be further explored by this Court as there is a paucity of precedent on this specific point.

In McDougall v. Dixon, 921 F.2d 518 (1990), the Fourth Circuit again addressed the conflict issue in terms of the bar suspension of the defendant's lead counsel. After a substantial hearing on the matter in the District Court, the Circuit rejected the Habeas Corpus Petition, finding that there was no showing that the lawyer's performance was adversely affected by his medical problems. McDougall, unlike Roach, not only deals with criminal conduct on the

part of the trial lawyer, but the lawyer's emotional problems as well. Petitioner requests this Court to recognize that the criminal conduct of Dyson was far more serious (it was ongoing and involved breaches of trust even as Petitioner's case was tried) than the disbarment problems existing in the Roach and McDougall cases.

Further, Petitioner asks this Court to recognize two distinct differences between McDougall and this case. First, the doctor who treated the defendant's counsel in McDougall felt that he was physically and intellectually capable of practicing law. Here, Dyson informed his psychiatrist that he had been "lying to clients" and been "clinically depressed" for a year. Second, and perhaps more noteworthy, the challenged counsel (Paul) in McDougall was not the only counsel for defendant, but one of a team of attorneys and experts. Here, however, Dyson was Petitioner's sole counsel.

The District Court's opinion below only analyses Groom's claims that Dyson was ineffective in terms of Dyson's involvement in the illegal wire fraud activities. The District Court dismisses from its ineffectiveness analysis without comment the extremely serious contention that Dyson was disabled by mental illness. A complete Strickland v. Washington, 466 U.S. 668 (1984) analysis of the ineffectiveness claim cannot be made without examination of both factors as undoubtedly the severity of counsel's mental problems contributed to his criminality, and his ability to represent Groom. Petitioner asserts that Dyson's clinical depression was so severe that a presumption of prejudice arises.

The District Court apparently did not properly consider the impacting report from Dr. Eugene J. Conley. Dyson's own words to his doctor are the best proof that he was completely unable to provide legal services to Groom, meeting the criteria for a presumption of ineffectiveness or the objectively reasonable standard established in Strickland, supra.

Groom requested an evidentiary hearing to demonstrate the importance of Dyson's psychiatric history and its relationship to his trial performance, but the District Court only permitted a hearing relating to Brown's perjury. Apparently, the District Court did not consider the psychiatric evidence to be important enough to justify the taking of evidence. Groom contends this was a critical error warranting a remand for the taking of evidence.

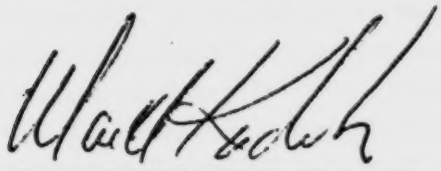
Groom asserts the mental condition of Dyson was catastrophic to the attorney-client relationship, particularly because it was concealed from Groom. It was not contested by the Government in any of its filings of this case. Clearly, the psychiatric issues would meet the presumption test and the prejudice prong of Strickland. If Dyson was lying to his clients about his work then there must be a reasonable likelihood that but for this disastrous mental illness the trial result would have been different. And it would be difficult for a reviewing court not to find this case does present per se ineffectiveness because trial counsel was, in fact, mentally paralyzed according to Dr. Conley and unable to make reasonable trial decisions.

Dyson's mental illness prohibited him from subjecting the prosecution's case to meaningful adversarial testing. He did not follow through on discovery and he did not attack the credibility of an extremely over-embellished key Government witness (Brown). As a result, Petitioner's Sixth Amendment right to effective counsel was denied, "leaving the adversary process", according to Justice Stevens in Cronic, supra, "presumptively unreliable". The severity of the trial lawyer's mental illness and his criminal activity, both occurring as he represented Petitioner, cry out for review by this Court.

CONCLUSION

Petitioner requests that his conviction be vacated and he be released unless the Government timely initiates new charges. Alternatively, he requests a remand on the second question presented.

Respectfully Submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PORTEAL GROOM		*
		*
Plaintiff		*
		*
	Civil No. PJM 99-2881	*
V.	(Criminal No. PJM 95-0294)	*
		*
UNITED STATES OF AMERICA		*
		*
Defendant		*

Filed May 25, 2001

OPINION

Porteal Groom has filed a Petition to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, alleging that newly discovered evidence of the perjury of an expert witness for the prosecution entitles him to relief. Having considered the pleadings and heard oral argument, the Court will **DENY** the petition.

I.

On May 21, 1996, a trial commenced in which Groom was charged with (1) conspiracy to possess with the intent to distribute heroin in violation of 21 U.S.C. §846; (2) possession with intent to distribute and distribution of heroin in violation of 21 U.S.C. § 841; (3) conspiracy to import heroin in violation of 21 U.S.C. § 963; and (4) importation of heroin in violation of 21 U.S.C. §§ 952 and 963. The jury convicted Groom on all four counts and the Court sentenced him to 262 months imprisonment. The Fourth Circuit affirmed the

conviction and sentence, and the Supreme Court subsequently denied certiorari.

Groom then filed the present petition, alleging three grounds for relief: (1) that newly discovered evidence establishes that the Government's expert witness perjured himself, (2) that counsel rendered ineffective assistance, and (3) that "Ground One and Two when reviewed in tandem require the granting of the writ."[1]

The court heard argument on the issue of the expert witness' perjury and kept the record open for an additional thirty days thereafter. During that time Groom filed supplemental briefs relating to the expert's perjury and raising, as an additional ground for relief, the Supreme Court's decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

II.

Groom's first argument is that the Government's "international narcotics distribution" expert, a D.C. Metropolitan Police Department investigator named Johnny St. Valentine Brown, perjured himself during trial by claiming false academic credentials and by mischaracterizing his past investigative experience. Specifically, Brown testified that he was a "board-certified pharmacist" and stated in his curriculum vitae that he held a degree in Pharmacy from Howard University. Groom has attached to his Petition several letters establishing that Virginia, Maryland, and the District of Columbia have no record of Brown being a licensed pharmacist in any of those jurisdictions and that Howard

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[1]The Court construes Groom's third ground as adding nothing of substance to his first two grounds and thus will not discuss it separately.

University has no record of "Johnny Brown, Jr." ever having received a degree. Groom has also submitted information tending to show that, contrary to his testimony, Brown never traveled to Pakistan for investigation of narcotics cases; that he was hired by the Metropolitan Police Department not as a narcotics consultant but as a senior police officer; and that the Metropolitan Police Department paid him $30,000 per year instead of $70,000 per year.

Groom contends that Brown's testimony was essential to the Government case because he was their last witness and one "presented to the jury with great fanfare as a pharmacist and a law enforcement officer who could expertly tell all there is to know about how heroin was made and traded." Had the Court known at the time of trial that Brown's credentials were falsified, Groom argues, it would have stricken his testimony in its entirety. He asserts that, because the perjury was material to critical issues in the case and because defense counsel never had an opportunity to develop an attack on Brown's credibility, the Court should grant a new trial.

1. Fed. Rule Crim. Proc. 33 provides that "the court may grant a new trial...if the interests of justice so require." The Fourth Circuit has adopted a five-part inquiry in determining whether a new trial should be granted under the Rule: (1) Is the evidence, in fact, newly discovered; (2) Are facts alleged from which the court may infer due diligence on the part of the movant; (3) Is the evidence relied upon not merely cumulative or impeaching; (4) Is the evidence material to the issues involved; and (5) Would the evidence probably result in acquittal at a new trial? *United States v. Chavis*, 880 F.2d 788, 792 (4th Cir. 1989). Unless the answer to each of these inquiries is in the affirmative, a new trial is not warranted. *Id.; see also United States v. Lofton*, 233 F.3d 313 (4th Cir. 2000); *United States v. Mosley*, 178 F.R.D. 470, 472 (W.D.Va. 1998).

Groom argues that the test for granting a new trial is more lenient where perjured testimony comes from an expert witness who is "essentially an arm of the prosecution." That is, if the Government knew or should have known that the testimony was false, the standard for materiality of the

testimony "is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995)(prosecutor's failure to disclose material evidence was *Brady* violation). Groom submits that the proper standard for granting a new trial, given Brown's relationship with the Government, is whether there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994)(*quoting United States v. Agurs*, 427 U.S. 97, 103 (1976)).

While he in no way suggests that the Government was aware of Brown's false statements, Groom does assert that the Government had constructive knowledge of the falsity, inasmuch as perjury of Government law enforcement witness is imputed to the prosecutor. *See e.g., Boyd v. French*, 147 F.3d 319, 329 (4th Cir. 1998) *cert. denied*, 119 S.Ct. 1050 (1999)("knowingly false or misleading testimony by a law enforcement officer is imputed to the prosecution"); *Kelly*, 35 F.3d at 929-934. The Government responds that *Boyd* is factually distinguishable from the present case because it addresses situations in which the police are conducting an investigation at the prosecution's behest and they fail to alert the prosecutor to exculpatory evidence in their files. In Groom's case, says the Government, Brown's qualifications were not evidence in the control of the Government in the sense that investigative evidence would be.

While the Court is inclined to agree with the Government that non-disclosure of Brown's perjury is distinguishable from non-disclosure of the type contemplated by *Boyd*, it need not decide the issue. The short of the matter is that Groom is otherwise unable to establish his entitlement to a new trial under the standard set forth in *Kelly*.

2. Most significantly, assuming that his Petition properly presents "newly discovered" evidence as to Brown's perjury, Groom has not demonstrated a "reasonable likelihood that the false testimony could have affected the judgment of

the jury." *Kelly*, 35 F.3d at 933. Brown's false credentials must be judged against the totality of the facts in the case.

The drug conspiracy with which Groom and his co-defendant Donald Wardrick were charged involved recruiting drug couriers and sending them from the United States to Pakistan, where they were given suitcases containing drugs, then arranging for their return to the United States where Groom or Wardrick received the suitcases. During its case-in-chief, the Government called 22 witnesses, three of whom were cooperators who had been involved in the drug conspiracy with both Groom and Wardrick. One such cooperator, Minerva Mojica, testified that she was Wardrick's girlfriend, that she was involved in the conspiracy as a receiver of shipments, and that both Groom and Wardrick were involved in the conspiracy with her. Mojica gave specific testimony regarding cell phones that Groom and Wardrick used on the night of their arrest. Two other co-conspirators, Michael Siranni and Michelle Cox, testified as to details of the conspiracy, and DEA surveillance provided evidence of Groom's presence at the drug pick-up site, his efforts at counter-surveillance during the drug pick-up, and his use of a telephone card to contact the Pakistani supplier just prior to the pick-up. In addition, the Government introduced over 100 items in evidence, including Pakistani documents and other business records that corroborated the testimony of the Government witnesses.

Brown was the Government's last witness. Unquestionably, he served to tie together certain testimony that had been offered by other Government witnesses. Groom argues that Brown's credentials as a pharmacist and his supposed international experience as a narcotics consultant were the foundation for all of his subsequent testimony and that, had the Government known these qualifications were false, it never would have called Brown as a witness and its case would have been substantially weakened. Alternatively, says Groom, if the Government had called Brown and the jury had discovered his falsified background, it might have

disregarded his testimony altogether. The Court is unpersuaded.

Although Brown did claim pharmacist's credentials when qualifying as an expert, the primary expertise he claimed in the area of drug trafficking in fact had nothing to do with holding an advanced degree in pharmacy, but was based instead on his actual experience as a detective and consultant. Specifically, Brown testified that he had 21-years' experience as a narcotics investigator, that he had done undercover work in the narcotics area, had participated in the investigation of more than 1,500 drug cases, had served as a consultant to the United States Congress in international drug trafficking, and had been involved in three Pakistani heroin cases.[2] Much of his testimony concerned general questions such as where heroin originated, how suitcases are used in international drug trafficking, and the like. Thus, to the extent his testimony was credited at all, it rested less upon his professed qualification as a pharmacist or his exaggerated experience than upon his years as an investigator. But the point is that, in marked contrast to his challenge to Brown's academic and international travel credentials, Groom raises no challenge to Brown's credentials as an experienced investigator and consultant. The Court accordingly finds no reason to believe that timely discovery of Brown's false academic and travel credentials would have put the "whole case in such a different light as to undermine confidence in the verdict." *Spicer v. Warden*, 31 F.Supp.2d 509, 519-520 (D.Md. 1998), *aff'd in part and rev'd in part on other grounds*, 194 F.3d 547 (4th Cir. 1999), *citing Kyles v. Whitley*, 514 U.S. at 435. Setting Brown's testimony wholly to the side, there is no "reasonable likelihood" that the jury's judgment would have been affected. The crucial, indeed dispositive, witness connecting Groom to the conspiracy was

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[2]If Groom's contention that Brown never traveled to Pakistan on official business is accurate, it is unclear to what extent Brown may have been involved in past Pakistani heroin investigations. Nevertheless, it appears that Brown's visits to Pakistan were an insignificant element of his overall narcotics investigation experience.

Mojica, not Brown. Moreover, the jury could have found Groom guilty of distribution simply from the quantity of heroin he was found in possession of. *See United States v. Askew*, 88 F.3d 1065, 1070 (D.C. Cir. 1996)(jury could infer from the quantity of drugs possessed that a defendant intended to distribute them even without expert witness); *United States v. Williams*, 233 F.3d 592, 595 (D.C. Cir. 2000)("Any rational juror could infer from the fact that [the Defendant] was carrying 725 individual 'baggies' of heroin that he was intending to sell them.").

(B.) Finally, even if Groom could show a "reasonable likelihood that the false testimony could have affected the judgment of the jury," the Court, before granting a new trial, would still have to consider whether Brown's falsified credentials qualify as "newly discovered" evidence and whether facts support an inference of due diligence on the part of Groom in discovering the evidence. *United States v. Chavis*, 880 F.2d 788, 792 (4th Cir. 1989). The record shows that the Government provided defense counsel with Brown's vitae prior to trial, yet Groom provides no evidence that defense counsel could not at that time have investigated the authenticity of Brown's credentials in order to gain the information necessary to impeach Brown at trial. Instead Groom contends that "the fact that Brown's Vitae was in the defense's possession prior to trial only contributed to [Groom's] trial counsel's willingness to accept its contents as true."

This murky statement does little to advance Groom's case. At most, it says that because the vitae was given to defense counsel, counsel assumed it was accurate. But as Groom himself points out, the falsity of Brown's credentials first came to light through another lawyer's pre-trial investigative efforts in a case unrelated to Groom's. The same opportunity to probe existed here. The falsity of Brown's credentials was thus discoverable through due diligence more than a year before this Petition was submitted. As a result, Groom's claim of newly discovered evidence must fail. *See Brown v. Angelone*, 150 F.3d 370, 375-76 (4th Cir. 1998)(one-year

limitations period governs motions for collateral relief under § 2255).

III.

Groom next asserts that his trial attorney, Thomas Dyson, failed to provide effective assistance because Dyson's involvement in illegal wire fraud activities interfered with his investigation of the case and his review of Government discovery, including materials about Brown.

To vacate a conviction based on ineffective assistance of counsel, a petitioner must show (1) that the attorney's performance was deficient and (2) that the deficient performance prejudiced the defense in a manner that deprived the petitioner of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 669 (1984). In assessing whether an attorney's performance is deficient, a court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* At 689. Even if counsel's performance is deemed deficient, a petitioner may prevail only if there is also a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694; Roach *v. Martin*, 757 F.2d 1463, 1476-77 (4th Cir. 1985).

Groom contends that a conflict of interest may have existed because Dyson was committing federal criminal violations while representing his client.[3] The Fourth Circuit explored this issue in *Roach*, where trial counsel was under investigation for disbarment by the South Carolina Board of Commissioners and Grievances while at the same time representing Roach. The Court found no actual conflict of interest:

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[3]Groom does not contend that there exists a "per se" conflict of interest but instead requests an evidentiary hearing to determine if his illegal activities may have interfered with his representation in this case.

> First, Brooks [Roach's lawyer] was not under investigation by the same authorities that were prosecuting Roach. Secondly, Roach has made no showing that this alleged conflict of interest impaired Brooks' ability to defend Roach.

757 F.2d at 1479. Groom argues that his case is distinguishable from *Roach* and other similar cases because Dyson was eventually investigated and prosecuted by the same federal authority which prosecuted Groom and because Dyson's criminal conduct was more serious (it was ongoing and involved breaches of trust even as [Groom's] case was tried) than the conduct in *Roach*.

The Court notes at the outset, however, that Dyson was not under investigation at the time of Groom's trial. Moreover, assuming the severity of Dyson's conduct and the fact that he and Groom were eventually investigated and prosecuted by the same authority, Groom has not shown that Dyson's representation was in any way deficient. To be sure, Groom attempts to do so, listing several areas of possible ineffectiveness that he would like to explore by deposition, including Dyson's failure to (a) cross-examine Pakistani witnesses, (b) object to the testimony of Brown and Mojica, (c) file a pre-trial motion attacking the chain of custody, and (d) attend the Mojica plea. But Groom has not demonstrated how any of these actions fall outside the range of reasonable professional assistance, nor has he pointed to any other evidence that Dyson's involvement in a fraud scheme wholly unrelated to him had any effect on his ability to defend him. To the contrary, Dyson's pre-trial motion to suppress and subsequent objections to the admission of certain pieces of evidence at trial, including portions of Brown's testimony, show that he in fact developed and executed a plausible defense. Finally, even if Groom were able to show deficient performance on Dyson's part, there is no evidence that but for Dyson's errors the result of either the trial or the sentencing would have been different.

IV.

Groom's last ground for relief is based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* Groom asserts that his conviction is constitutionally flawed because the amount of heroin involved in the offense was determined at sentencing instead of submitted to the jury as required by *Apprendi*.

Apprendi, however, is inapplicable to this case. Since the filing of Groom's brief, the Fourth Circuit has held that *Apprendi* does not apply to cases on collateral review. *See United States v. Sanders*, 2001 WL 369719, at *6 (analyzing *Apprendi*'s retroactivity under the three-step test laid out in *Teague v. Lane*, 489 U.S. 288 (1989)). Groom, moreover, has failed to show cause and prejudice for failing to raise this issue on direct appeal. As the Supreme Court has stated, "habeas review is an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal citations omitted). Thus, "where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual prejudice, or that he is 'actually innocent.'" *Id.* at 622 (internal citations omitted); *see also Sanders*, 2001 WL 369719, at *4; *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999), *cert. denied*, 529 U.S. 1010 (2000).

Groom attempts to show "cause" by arguing that the *Apprendi* rule was not available prior to June 26, 2000 - the date on which *Apprendi* was decided. The Court, however, agrees with the Government that the legal basis for Groom's claim was reasonable available at the time of his plea and sentencing. *See, e.g., Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (noting the Supreme Court's belief in the constitutional principle subsequently articulated in *Apprendi*). In *Sanders*, the Fourth Circuit expressly rejected the argument that *Apprendi*

was so novel as to constitute "cause" for a procedural default. 2001 WL 369719, at *5. Sanders' conviction became final on January 15, 1998, and the Fourth Circuit still noted that "the germ of [his] *Apprendi* claim had sprouted at the time of his conviction and there is no reason why he could not have raised it then."[4] *Id.* If Sanders' *Apprendi* claim was available in January 1998, Groom's *Apprendi* claim was similarly available when his conviction became final in October 1998.

Groom has also failed to show that he has suffered any actual prejudice from his default, i.e., "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Groom has cited no reason and the Court sees none why it should conclude that the jury would not have found him guilty beyond a reasonable doubt of possessing with intent to distribute the entire quantity of heroin attributable to him.

Although he has not specifically alleged actual innocence with regard to his *Apprendi* claim, the Court considers this second prong of the *Bousley* test and finds, given the overwhelming nature of the evidence against him, that Groom is unable to meet it.

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[4]In fact, the Fourth Circuit cites with approval *United States v. Smith*, 241 F.3d 546 (7th Cir. 2001), which suggests that the foundation for *Apprendi* was laid long before 1992. *See Sanders*, 2001 WL 369719, at *5.

V.

For all these reasons, the Court will DENY his Motion to Vacate. A separate Order implementing this Opinion will be entered.

May 25, 2001

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PORTEAL GROOM		*
		*
	Plaintiff	*
		*
v.	Civil No. PJM 99-2881	*
	(Criminal No. PJM 95-0294)	*
		*
UNITED STATES OF AMERICA		*
		*
	Defendant	*

Filed May 25, 2001

ORDER

Upon consideration of Porteal Groom's Motion to Vacate, Set Aside, or Correct His Sentence pursuant to 28 U.S.C. § 2255, the Government's Opposition, and Petitioner's Reply, it is this 25th day of May, 2001

ORDERED:

(1) Petitioner's Motion is DENIED;

(2) The Clerk of the Court shall CLOSE this case.

_____

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-7227

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

PORTEAL GROOM,

Defendant - Appellant.

Filed December 6, 2001

Appeal from the United States District Court for the District of Maryland, at Baltimore. Peter J. Messitte, District Judge. (CR- 95-294-PJM, CA-99-2881-PJM)

Submitted: November 29, 2001
Decided: December 6, 2001

Before WIDENER, NIEMEYER, and WILLIAMS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Mark Jeffery Kadish, Atlanta, Georgia, for Appellant. David Ira Salem, Assistant United States Attorney, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Porteal Groom seeks to appeal the district court's order denying his motion filed under 28 U.S.C.A. S 2255 (West Supp. 2001). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny Groom's motion for a certificate of appealability and dismiss the appeal on the reasoning of the district court. United States v. Groom, Nos. CR-95-294-PJM; CA-99-2881-PJM (D. Md. filed May 24, 2001 & entered May 25, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED